AND
RIEFS

No. 16-1161

Supreme Court, U.S.
FILED
SEP 1 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BEVERLY R. GILL, *et al.*,

Appellants,

v.

WILLIAM WHITFORD, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF FOR *AMICI CURIAE* AMERICAN JEWISH COMMITTEE, ANTI-DEFAMATION LEAGUE, COUNTY OF SANTA CLARA, DEMOCRACY 21, DĒMOS, FRIENDS OF THE EARTH, GOVERNMENT ACCOUNTABILITY PROJECT, NATIONAL COUNCIL OF JEWISH WOMEN, NATURAL RESOURCES DEFENSE COUNCIL, ONEVIRGINIA2021: VIRGINIANS FOR FAIR REDISTRICTING, AND PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLEES

DAVID LEIT
Counsel of Record
NATALIE J. KRANER
ERIC WEINER
BRANDON FIERRO
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, New Jersey 07068
973-597-2500
dleit@lowenstein.com
Counsel for Amici Curiae

September 5, 2017

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. Entrenchment Through Severe Partisan Gerrymandering Violates Fundamental American Democratic Principles Of Representativeness And Accountability In Government. 6

A. Our Founders Designed a Government Founded Upon the Consent of the Governed. 7

B. Our Founders Warned that Factions and Partisanship Threaten Representative Democracy. 12

C. Contemporary Elected Officials Recognize the Same Risks to Representative Democracy in Modern Partisan Gerrymandering that Our Founders Saw in Excessive Partisanship. 14

D. American Citizens, Recognizing the Same Threat as the Founders and Contemporary Elected Officials, Support Limits on Gerrymandering. 18

E. This Court Has Long Recognized the Centrality of Representativeness and Accountability to American Values. 19

II. The Court Must Set Limits On Severe Partisan Gerrymandering To Safeguard Our Democracy. 21

A. In Light of the Dangers of Entrenchment, this Court Has Recognized That Severe Partisan Gerrymanders Undermine American Democracy. 22

B. Claims of Severe Partisan Gerrymandering Are Justiciable. 25

III. This Court Should Declare Act 43 Unconstitutional To Ensure That The American Promise Of Representative Democracy Is Fulfilled. 30

CONCLUSION 36

APPENDIX: LIST OF AMICI CURIAE 1a

TABLE OF AUTHORITIES

CASES — PAGES

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015) 2, 6, 25, 33

Baker v. Carr, 369 U.S. 186 (1962) 27

Benisek v. Lamone, No. 1:13-cv-03233, 2017 WL 3642928 (D. Md. Aug. 24, 2017) 22, 29

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 28

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 20

Clinton v. City of New York, 524 U.S. 417 (1998) 30

Davis v. Bandemer, 478 U.S. 109 (1986) ..... passim

Duncan v. McCall, 139 U.S. 449 (1891) 20

Fortson v. Dorsey, 379 U.S. 433 (1965) 22, 27

Gaffney v. Cummings, 412 U.S. 735 (1973) 27

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 28

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 20

Powell v. McCormack,
395 U.S. 486 (1969) 20, 21

Republican Party of La. v. FEC,
137 S. Ct. 2178 (2017) 5

Reynolds v. Sims,
377 U.S. 533 (1964) 22, 27

Town of Castle Rock, Colo. v. Gonzales,
545 U.S 748 (2005) 28

United States Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 20, 21

United States v. Carolene Products Co.,
304 U.S. 144 (1938) 25

Vieth v. Jubelirer,
541 U.S. 267 (2004) ..... passim

Williams-Yulee v. Florida Bar,
135 S. Ct. 1656 (2015) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend XI 20

U.S. Const. art. I, § 2, cl. 1 ..... 2, 8

U.S. Const. art. IV, § 4 ..... 2, 8

OTHER AUTHORITIES

John Adams, *Novanglus Papers* No. 7 (1774), *reprinted in* 4 The Works of John Adams 106 (Charles Francis Adams ed., 1851) 11

John Adams, *Thoughts on Government* (1776), *in* 1 The Founders' Constitution 108 (Philip B. Kurkland & Ralph Lerner eds., 1987) 9

Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting* (Nov. 20, 1772), *reprinted in* 7 Old South Leaflets 417 (No. 173) (Burt Franklin 1970) 7

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (A. Hamilton & R. Livingston) (Jonathan Elliot ed., 2d ed. 1836) 10

The Declaration of Independence (U.S. 1776) 2, 7, 8

The Federalist No. 10 (James Madison) (P.F. Collier & Son ed., 1901) 13

The Federalist No. 37 (James Madison) (P.F. Collier & Son ed., 1901) 10

The Federalist No. 38 (James Madison) (P.F. Collier & Son ed., 1901) 4

GerryRIGGED: Turning Democracy On Its Head, YouTube (Feb. 15, 2017), https://www.youtube.com/watch?v=vD3ZZ-wzrHQ. 17

The Harris Poll #80, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013), http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html 18, 19

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Tom Jensen, *Health Care a Mine Field for Republicans; Many Trump Voters in Denial on Russia*, http://www.publicpolicypolling.com/pdf/2017/PPP_Release_National_71817.pdf 19

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 Colum. L. Rev. 1 (1988) 10

Robert G. Natelson, *Guarantee Clause, The Heritage Guide to the Constitution*, The Heritage Foundation, http://www.heritage.org/constitution#!/articles/4/essays/128/guarantee-clause (last visited Aug. 27, 2017) 8

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President Ronald Reagan, *Remarks at the Republican Governors Club Annual Dinner* (Oct. 15, 1987), http://www.presidency.ucsb.edu/ws/?pid=3355 15

President George Washington, *Farewell Address to the People of the United States* (1796), *reprinted in* S. Doc. No. 106-21, at 14 (2d Sess. 2000) 14, 33, 34

Dave Umhoefer, *Gerrymandering of Districts Means Voters Don't Pick Their Representatives, Ribble Says*, Milwaukee J. Sentinel (July 23, 2013), http://archive.jsonline.com/blogs/news/216586311.html. 17

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STATEMENT OF INTEREST[1]

Amici Curiae are organizations and governmental entities that pursue public policy goals through the American political system. Because they work extensively in the political system, *amici* rely upon fair elections to ensure that elected policy makers represent and are meaningfully accountable to their constituents. Accordingly, they are particularly concerned about legislative entrenchment, that is, the drawing of district lines to ensure that one party will control a particular legislative body for as long as possible. *Amici* submit this brief to offer a thorough analysis of how severe partisan gerrymandering, as occurred in Wisconsin, contravenes fundamental, long-standing American democratic values and requires a strong judicial response to ensure that American government will continue to operate by the consent of the people.

A full list and description of *amici* is attached as an Appendix to this brief.

SUMMARY OF ARGUMENT

On December 16, 1773, the Sons of Liberty dumped British tea into Boston Harbor to protest the British Parliament's imposition of the Tea Act of

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[1] Letters from the parties consenting generally to the filing of briefs by *amici curiae* are on file with the Court. Pursuant to Supreme Court Rule 37.6, we note that no part of this brief was written by counsel for any party, and no person or entity other than *amici* and their counsel made any monetary contribution to its preparation or submission.

1773, which the British Parliament had imposed without representation from the American colonies. Two and a half years later, Thomas Jefferson cited the right of the people to be fairly represented in their government (or, more precisely, the derogation of that right by the British) in the United States Declaration of Independence as a casus belli warranting revolution: "Governments are instituted among Men, deriving their just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776).

By 1787, the principle of government accountable to the People was enshrined in multiple clauses of the United States Constitution:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .

U.S. Const. art. I, § 2, cl. 1.

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

U.S. Const. art. IV, § 4.

Today, 230 years later, this bedrock of American democracy is imperiled. The threats of severe partisanship, forewarned by George Washington, John Adams, James Madison, and others, have manifested as legislative entrenchment obtained through partisan gerrymandering, which this Court has defined as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State*

Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015).

Incumbent lawmakers use increasingly sophisticated techniques to redraw electoral districts to entrench their power. Using map-drawing software, highly detailed data about voting patterns, and sophisticated statistical analyses and tools, incumbents "crack" and "pack" electoral districts to ensure continued control over legislatures under virtually any conceivable voting pattern. Voters no longer choose their representatives; maps crafted by party leaders and their consultants choose representatives, depriving the people of a meaningful voice in government.

The core issue before the Court is the same as at the Boston Tea Party: the right of American citizens to be governed by representatives of their choosing, rather than by an entrenched ruling class. The modern entrenched ruling class no longer holds power derived from a monarchy or aristocracy, but through the careful manipulation of election districts. Contemporary elected officials, and the vast majority of Americans, irrespective of party affiliation or political philosophy, share this concern. They overwhelmingly oppose partisan gerrymandering because it creates a government that operates without the consent of the governed and is, therefore, antithetical to the American values upon which our nation was founded.

In this brief, *amici* first examine the origins and meaning of the fundamental American democratic values of representation and accountability, as well

as the current views of American political leaders and citizens about partisan gerrymandering.

Second, *amici* demonstrate that Wisconsin's Act 43 is a severely partisan gerrymander. If allowed to stand, it will function exactly as designed: it will entrench Republican control of the Wisconsin legislature, for at least ten years, by purposefully diluting the voting strength of Democratic voters statewide. It is undisputed that incumbent lawmakers in Wisconsin adopted Act 43 for the express purpose of redrawing district maps that would ensure that, under any likely voting scenario, their political party would have a durable majority of legislative seats for the foreseeable future.

This Court has previously recognized the "incompatibility of severe partisan gerrymanders with democratic principles." *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004). If severe partisan gerrymandering, such as that which occurred in Wisconsin, is permitted to continue, the outcomes of elections will not reflect the will of the "great body of society" (The Federalist No. 38, at 206 (James Madison) (P.F. Collier & Son ed., 1901)), but rather the will of the partisan incumbents who draw the maps. Governmental authority will no longer be derived from the people, but from "an inconsiderable proportion or a favored class of it." *Id.*

Finally, *amici* urge this Court to recognize that it is uniquely positioned as the only American institution that can ensure that our elections are conducted in a manner consistent with our core democratic principles. Wisconsin's Act 43 is not only incompatible with the fundamental democratic

principles of fair representation and accountability that spurred the American Revolution and remain at the very core of American values, but also meets the standard for an equal protection violation endorsed by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986). Act 43 creates an "electoral system [that] substantially disadvantages certain voters in their opportunity to influence the political process effectively," and the existence of such disadvantaging is "supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133.

Severe partisan gerrymanders cannot be resolved by the democratic political process, because the very nature of the problem is that severe partisan gerrymanders subvert the democratic political process. Without this Court's intervention and setting of limits on severe partisan gerrymandering, our system will devolve into precisely what our Founders declared our independence from: government administered by an entrenched ruling class, rather than by the consent of the people. *Amici* urge this Court to affirm the decision below and find Wisconsin's Act 43 to be an unconstitutionally severe partisan gerrymander.

ARGUMENT

I. Entrenchment Through Severe Partisan Gerrymandering Violates Fundamental American Democratic Principles Of Representativeness And Accountability In Government.

The importance of representative democracy is as deeply ingrained in the values of the Founders as in the views of modern leaders and citizens. Our Founders' guidance is unambiguously stated in the Declaration of Independence, the Constitution, and the Federalist Papers. The core values set forth therein continue to be shared today by an overwhelming majority of Americans, including both citizens and elected leaders. This Court has also recognized what the Founders knew, and the modern day electorate know, to be true: that severe partisan gerrymanders such as Wisconsin's Act 43 "entrench a rival party in power" and, in doing so, violate fundamental principles of American democracy. *Ariz. State Legislature*, 135 S. Ct. at 2658.

Severe partisan gerrymandering undermines faith in America's most basic civic principle: the right of the people to elect their representatives, who remain accountable to the people. The frustration of American citizens today echoes that of American colonists prior to the Revolution. As in the colonial era, public outrage is building as citizens realize that their government is increasingly controlled by an entrenched ruling class, unrepresentative of, and unaccountable to, the people they govern.

A. Our Founders Designed a Government Founded Upon the Consent of the Governed.

The origins of the United States of America lie in opposition to a government that did not represent the citizenry. Americans objected to acts of the British Parliament such as the Currency Act of 1764, the Sugar Act of 1764, the Stamp Act of 1765, and the Tea Act of 1773 (the trigger of the Boston Tea Party). In each case, the core of the protest was the lack of American representation in the Parliament that passed these laws. Samuel Adams explained that this protest was an assertion of the people's natural and constitutional rights to adequate representation in their government. *See generally* Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting* (Nov. 20, 1772), *reprinted in* 7 Old South Leaflets 417 (No. 173) (Burt Franklin 1970).

When American patriots declared independence from Britain in 1776, they made it clear that the British government lacked legitimacy in America because the members of Parliament were not elected by, and did not represent, the people they governed. The Declaration of Independence para. 2 (listing Great Britain's "history of repeated injuries and usurpations," including interfering with the Colonists' right to representation in government and "imposing Taxes on [them] without [their] Consent"). The Declaration of Independence further cited lack of representation as grounds for revolution: "Governments are instituted among Men, deriving their just powers from the consent of the governed."

Id. The core idea animating the founding of this new nation was to establish a government whose legitimacy would be derived from the consent of the governed, rather than from the power of those who govern.

Our Founders created a new government in which representatives would be chosen "by the People." U.S. Const. art. I, § 2, cl. 1. They adopted a Constitution that guaranteed every state "a Republican Form of Government." U.S. Const. art. IV, § 4. The Heritage Foundation explains the importance and meaning of the Guarantee Clause as follows:

> Participants in the Constitutional debate of 1787–1788 expressed varying views over exactly what constituted the "Republican Form" of government. However, there was a consensus as to three criteria of republicanism, the lack of any of which would render a government un-republican.
>
> The first of these criteria was popular rule. The Founders believed that for government to be republican, political decisions had to be made by a majority (or in some cases, a plurality) of voting citizens. The citizenry might act either directly or through elected representatives. Either way, *republican government was government accountable to the citizenry.*

Robert G. Natelson, *Guarantee Clause, The Heritage Guide to the Constitution*, The Heritage Foundation, http://www.heritage.org/constitution#!/articles/4/essa

ys/128/guarantee-clause (last visited Aug. 27, 2017) (italics added).

Embodied in this first criterion of "popular rule" are two core principles of a republican form of government: representativeness and accountability. Our representatives must fairly reflect the democratic vote of the citizens, and once those representatives are in office, they must be accountable to the citizenry. The adoption of these core principles was the critical difference between our new form of American government and the old British one. The British system of government relied on social hierarchy. The ruling class and the people were represented separately. Keith E. Whittington, *The Place of Congress in the Constitutional Order*, 40 Harv. J.L. & Pub. Pol'y 573, 576 (2017). Our government, by contrast, was designed to represent the interests of the people, not preserve the status of a ruling class. *See* John Adams, *Thoughts on Government* (1776), *in* 1 The Founders' Constitution 108 (Philip B. Kurkland & Ralph Lerner eds., 1987) (a representative assembly "should think, feel, reason, and act like" the "people at large").

"Representativeness" does not necessarily mean that elected representatives must proportionally represent the political make-up of the citizens, but that the citizens must be free to elect their representatives without having their choices controlled by a ruling class. Alexander Hamilton and Robert Livingston explained the importance and meaning of "representation" during the New York convention considering adoption of the Constitution:

> [T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.

2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 257 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter *Elliot's Debates*] (A. Hamilton).

> The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.

Id. at 292-93 (R. Livingston).

Our Founders also understood that representativeness in government is intertwined with accountability.[2] In Federalist 37, James Madison explained: "the genius of republican liberty seems to demand . . . not only that all power should be *derived from the people*, but that those intrusted with it should be *kept in dependence on the people*." The Federalist No. 37, at 192 (James Madison) (P.F. Collier & Son ed., 1901) (italics added). A representative government "is futile if legislators are

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[2] Contemporary academics agree that a republican government is one in which the people control their rulers. *See, e.g.*, Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for A Third Century*, 88 Colum. L. Rev. 1, 23 (1988).

not responsive to the constituents that they represent." Whittington, *supra*, at 580. Citizens must have not only the right to elect their representatives, but a meaningful ability to remove them in future elections. Indeed, "[t]he crucial function of the people in a democracy is not to make policy but to determine to whom 'the reins of government should be handed.'" *Id.* at 581 (quotation omitted).[3]

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[3] The Founders' promise of representative and accountable democratic government was not immediately or fully realized in the early days of the republic. Since its founding, America has strived to close the gap between its founding ideals and practical reality. Our Founders did not always live or govern in ways that lived up to the ideals (such as equality, representation, and accountability) they espoused. That is why America is, in the words of John Adams, a "government of laws, and not of men." John Adams, *Novanglus Papers* No. 7 (1774), *reprinted in* 4 The Works of John Adams 106 (Charles Francis Adams ed., 1851). As a nation, we are guided by our Founders' commitment to their ideals. While they may have sometimes failed in their lifetimes to fully realize those ideals, it is our task "to be dedicated here to the unfinished work which they . . . so nobly advanced." President Abraham Lincoln, *Gettysburg Address*, 1 Documents of American History 429 (H. Commager ed., 9th ed. 1973). America (and this Court) has, for example, grappled over the centuries with how to make America live up to the ideal that "all men are created equal." The struggle to bring the ideals of representativeness and accountability into practical reality has been advanced both through legislative action (*e.g.*, the Seventeenth Amendment, putting the election of Senators directly in the hands of the people; and the Thirteenth, Fourteenth,

If elected representatives can dictate election outcomes by drawing maps and electoral districts that "place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation," J.S. App. 109a-110a, representativeness and accountability are lost. A government that derives its just powers from the consent of the governed requires that the government be representative of, and accountable to, the people.

B. Our Founders Warned that Factions and Partisanship Threaten Representative Democracy.

Our Founders understood that representativeness and accountability could not be taken for granted, and foresaw that a representative democracy contained within it the seeds of its own potential destruction. The liberty provided by free association and democracy naturally leads like-minded citizens to band together to pursue their shared values. Collective political action benefits democracy, but factionalism becomes detrimental when the power of a particular faction to pursue its parochial interests undermines the people's right to fair and meaningful representation.

James Madison warned of the dangers of "faction"—"a majority or a minority of the whole, who

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Fifteenth, and Nineteenth Amendments, extending rights to previously disenfranchised Americans) and through this Court (*e.g.*, the "one person, one vote" cases). This case represents another step in that continual quest.

are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"—but believed that our Constitution would help restrain such dangers. Federalist No. 10, at 45 (James Madison) (P.F. Collier & Son ed., 1901). In fact, Madison regarded this as one of the greatest virtues of the Constitution: "Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." *Id.* at 44. While Madison understood that the root causes of factionalism could not be eradicated (and indeed, should not, since such causes were the natural and unavoidable byproducts of liberty, freedom of thought, and freedom of association), Madison also understood that excess factionalism should be restrained by republican government: "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." *Id.* As he left office, George Washington likewise warned future generations that, left unchecked, political parties could

> serve to organize faction, to give it an artificial and extraordinary force; to put, in the place of the delegated will of the nation the will of a party, often a small but artful and enterprising minority of the community; and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted

> and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common counsels and modified by mutual interests.

President George Washington, *Farewell Address to the People of the United States* (1796), *reprinted in* S. Doc. No. 106-21, at 14 (2d Sess. 2000) [hereinafter *Washington's Farewell Address*], https://www.gpo.gov/fdsys/pkg/GPO-CDOC-106sdoc21/pdf/GPO-CDOC-106sdoc21.pdf.

Washington also recognized that, while a single faction's domination might not be permanent, the "spirit of revenge" could lead to alternating dominance of factions, and eventually to a "frightful despotism." *Id.* at 16-17.

C. Contemporary Elected Officials Recognize the Same Risks to Representative Democracy in Modern Partisan Gerrymandering that Our Founders Saw in Excessive Partisanship.

American leaders across the political spectrum agree that modern gerrymandering can result in entrenchment that critically threatens our core values of representation and accountability in government. Both major parties have drawn partisan gerrymanders when it suited their immediate interests. The political pressure to win individual elections means that parties in power exploit the advantages of partisan gerrymandering when it suits their near-term goals. But when distanced from the intensity of any immediate election, leaders from both parties have recognized that partisan

gerrymandering is a pernicious danger that must be addressed for the sake of our democracy.

In 1987, President Ronald Reagan addressed the Republican Governors Club and emphasized the fundamental unfairness of severe partisan gerrymandering by Democrats in California. The results of the California state legislature elections in 1984, as described by President Reagan, were remarkably similar to what happened in Wisconsin in this case:

> In California, one of the worst cases of gerrymandering in the country, Republicans received a majority of votes in congressional races, but the Democrats won 60 percent more races. The fact is gerrymandering has become a national scandal. The Democratic-controlled State legislatures have so rigged the electoral process that the will of the people cannot be heard. They vote Republican but elect Democrats.

President Ronald Reagan, *Remarks at the Republican Governors Club Annual Dinner* (Oct. 15, 1987), http://www.presidency.ucsb.edu/ws/?pid=3355.

President Reagan went on to describe the contorted maps that had been drawn to ensure Democratic "safe seats," concluding that the entire process was an affront to American values: "But it isn't just the district lines the Democrats have bent out of shape: it's the American values of fair play and decency." *Id.*

President Barack Obama made precisely the same point in his State of the Union Address in 2016:

> [I]f we want a better politics, it's not enough just to change a congressman or change a senator or even change a President. We have to change the system to reflect our better selves. I think we've got to end the practice of drawing our congressional districts so that politicians can pick their voters, and not the other way around.

President Barack Obama, *State of the Union* (Jan. 13, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address.

In 2014, Jon Husted, the Secretary of State of Ohio, published an op-ed in the Washington Post, writing that partisan gerrymandering was fundamentally damaging our democracy: "[g]errymandering is the fractured foundation on which our legislative branch of government is built." Jon Husted, Opinion, *From Ohio, Lessons in Redistricting Reform*, Wash. Post, Feb. 6, 2014. Secretary Husted, a self-described "conservative Republican," acknowledged that gerrymandering in Ohio had favored his own party, such that, while the statewide vote in Ohio in 2012 had gone to President Obama, Republicans still maintained outsized advantages in all of the races affected by gerrymandering, controlling the Ohio House 60 to 39, the Ohio Senate 23 to 10, and the Ohio delegation to the U.S. House 12 to 4. *Id.* The voters of Ohio no longer could control who represented them, because "the line-drawing process can all but guarantee the outcome of general elections." *Id.*

United States Senator Tim Kaine has similarly observed that, because "gerrymandering . . . produces a maximum number of non-competitive seats . . . [if] somebody is in a non-competitive seat, they don't have to be that responsive to their constituents." *GerryRIGGED: Turning Democracy On Its Head*, YouTube (Feb. 15, 2017), https://www.youtube.com/watch?v=vD3ZZ-wzrHQ. This specific intent to maximize partisan advantage by reducing the consequences of unresponsiveness to constituents is fundamentally incompatible with the fundamental democratic value of accountability.

Secretary Husted's and Senator Kaine's descriptions of gerrymandering echo the statements of those who controlled the line-drawing process in Wisconsin: "The maps we pass will determine who's here 10 years from now." J.S. App. 28a (internal quotations and marks omitted). Partisan gerrymandering removes the election of representatives from the hands of voters and places it in the hands of map-drawers. It is the same observation made by former Republican Congressman Reid Ribble of Wisconsin: "We're at a place now in this country where voters are not picking their representatives anymore. Representatives, through the gerrymandering process and redistricting, are picking their voters." Dave Umhoefer, *Gerrymandering of Districts Means Voters Don't Pick Their Representatives, Ribble Says*, Milwaukee J. Sentinel (July 23, 2013), http://archive.jsonline.com/blogs/news/216586311.html.

D. American Citizens, Recognizing the Same Threat as the Founders and Contemporary Elected Officials, Support Limits on Gerrymandering.

The American people also understand that severe partisan gerrymandering undermines our democracy, disenfranchises the people, and allows an entrenched ruling class to consolidate its own power. In a recent nationwide Harris Poll, "majorities across party lines affirm[ed] a desire to see the power to influence district boundaries out of the hands of those with a vested interest in the results." The Harris Poll #80, *Americans Across Party Lines Oppose Common Gerrymandering Practices* (Nov. 7, 2013), http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html. The poll found that "over seven in ten Americans believe (71% - 48% strongly so) that those who stand to benefit from redrawing congressional districts should not have a say in how they are redrawn." *Id.*

American opposition to political gerrymandering transcends party affiliation or political ideology. The Harris Poll showed "comparable views when compared by both political affiliation (74% Republicans, 73% Democrats, 71% independents) and underlying political philosophy (69% Conservative, 71% Moderate, 73% Liberal)." *Id.* Less than half of U.S. adults (45%) "believe their politics are fairly represented by the congressional representative from their district." *Id.* On the other hand, far more (71%) "believe that dividing up congressional districts is a way for state politicians to influence national politics" and 64% believe "redrawing districts is often

used to take power away from American voters." *Id.* Americans unite in rejecting severe partisan gerrymandering because, regardless of party allegiance, American citizens share the core values about representation and accountability in government that shaped our nation. Americans understand that modern gerrymandering practices subvert those values.

More recent national polling confirms that voters remain united in their rejection of political gerrymandering. Public Policy Polling conducted a nationwide survey in July 2017 and found:

> Only 16% of voters think politicians generally draw lines for Congressional and Legislative districts that are fair, [compared] to 60% who think they're usually unfair. Just 23% of Republicans, and 13% of Democrats and independents think that district lines are currently being drawn in a way that's generally fair.

Tom Jensen, *Health Care a Mine Field for Republicans; Many Trump Voters in Denial on Russia*, Public Policy Polling (Jul. 18, 2017), http://www.publicpolicypolling.com/pdf/2017/PPP_Release_National_71817.pdf.

E. This Court Has Long Recognized the Centrality of Representativeness and Accountability to American Values.

Almost 200 years ago, Chief Justice Marshall summarized the essence of American government: "The government of the Union, then, . . . is, emphatically, and truly, a government of the people.

In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819); *see also Duncan v. McCall*, 139 U.S. 449, 461 (1891) (noting that a "distinguishing feature" of the republican guarantee is "the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793) (defining a republican form of government as "one constructed on [the] principle, that the Supreme Power resides in the body of the people"), *superseded in part by* U.S. Const. amend XI.

More recently, the Court, while examining the Qualifications Clause, determined that a "fundamental principle of our representative democracy . . . [is] 'that the people should choose whom they please to govern them.'" *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (quoting *Elliot's Debates*, *supra*, 257 (A. Hamilton)). In reaching this conclusion, the Court agreed with John Wilkes' address to the Parliament in 18th-century England: "That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution." *Id.* at 534, n. 65 (quoting 16 Parl. Hist. Eng. 589–90 (1769)).

The Court further elaborated on its findings from *Powell* in *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). There, the Court

examined the history of the British experience, the Framers' intent, Constitutional text, and "the basic principles of our democratic system," to conclude that "an aspect of sovereignty is the right of the people to vote for whom they wish" and that "the right to choose representatives belongs not to the States, but to the people." *Id.* at 798, 820-21. The Court explained that the "Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people." *Id.* at 821; *see also id.* at 791 ("[W]e recognized [in *Powell*] the critical postulate that sovereignty is vested in the people" and that they have the right to choose their representatives "freely[.]").

II. The Court Must Set Limits On Severe Partisan Gerrymandering To Safeguard Our Democracy.

There is broad agreement—among the Justices of this Court, in the writings of our Founders, in public opinion, and in the views of politicians of both major parties—that severe partisan gerrymanders are incompatible with core American democratic values. As demonstrated below, the intent and effect of Act 43 is to undermine the ability of citizens to elect accountable representatives. It therefore endangers the American concept of governmental power derived from the consent of the governed.[4] Indeed, the very

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[4] While Act 43 favored Republicans, it would be equally objectionable no matter which political party it

nature of the problem makes it impossible to solve through the political process. It therefore falls to this Court to meet its fundamental responsibility to safeguard American democratic principles from those who would exploit the system to undermine it.

A. In Light of the Dangers of Entrenchment, this Court Has Recognized That Severe Partisan Gerrymanders Undermine American Democracy.

This Court has long recognized that "the basic aim of legislative apportionment" is "the achieving of fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). In *Fortson v. Dorsey*, for instance, this Court observed that either racial or political considerations in redistricting are subject to judicial review. 379 U.S. 433, 439 (1965). A redistricting scheme may not "comport with the dictates of the Equal Protection Clause" if it "would operate to minimize or cancel out the voting strength of racial or political elements of

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entrenched in the legislature. In fact, a highly analogous case, in which Democrats, rather than Republicans, are alleged to have engaged in partisan gerrymandering, was recently considered in the Fourth Circuit. *See Benisek v. Lamone*, No. 1:13-cv-03233, 2017 WL 3642928, at *15 (D. Md. Aug. 24, 2017) ("The record demonstrates, without any serious contrary evidence, that the Maryland Democrats who were responsible for redrawing congressional districts in 2011 specifically intended to dilute the votes of Republicans in the Sixth District and in fact did so." (Niemeyer, J., dissenting).

the voting population." *Id.* In *Davis v. Bandemer*, the Court acknowledged the justiciability of partisan gerrymanders and the Court's own role in adjudicating the claim that "each political group in a State should have the same chance to elect representatives of its choice as any other political group." 478 U.S. at 124. A plurality concluded, however, that the Indiana Democrats challenging the gerrymander had failed to prove an Equal Protection violation. *Id.* at 136.

Thirteen years ago, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a majority of the Court declined to disturb the justiciability holding of *Bandemer*. In a controlling concurrence, Justice Kennedy held that, despite the justiciability of their claims, the appellants could not prevail because "in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights." *Id.* at 313. Yet all of the Justices reaffirmed that "severe partisan gerrymanders" (a phrase used by Justice Breyer in his dissent and adopted by Justice Scalia, writing for the plurality) threaten basic democratic values.

In his dissent, Justice Stevens recognized that, while the various opinions in *Vieth* presented real points of disagreement, "the areas of agreement set forth in the separate opinions are of far greater significance." *Id.* at 317. Justice Stevens highlighted the fact that

> [the] danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast

> ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all. The problem, simply put, is that the will of the cartographers rather than the will of the people will govern.

Id. at 331.

Writing for the plurality, Justice Scalia explicitly agreed with Justice Stevens, decrying "the incompatibility of severe partisan gerrymanders with democratic principles." *Id.* at 292.

Justice Breyer, reasoning from fundamental principles of American democracy, wrote:

> "We the People," who "ordain[ed] and establish[ed]" the American Constitution, sought to create and to protect a workable form of government that is in its "'principles, structure, and whole mass,'" basically democratic. In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators representing equally populous electoral districts. There must also be a method for transforming the will of the majority into effective government.

Id. at 356 (Breyer, J., dissenting) (internal citations omitted).

In his concurrence, Justice Kennedy expressed deep concern about gerrymanders that apply political classifications "in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307. Justice Kennedy remained optimistic that the

Court would find a workable way to address such claims because "[a]llegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" *Id.* at 311-12 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938)).

Most recently, in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, the Court recognized the Founders' intent and the need to "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." 135 S. Ct. at 2672. The Court took note of the conflict of interest "inherent when 'legislators dra[w] district lines that they ultimately have to run in.'" *Id.* (quotation omitted). Legislators cannot claim to be serving any legitimate state interest when their conflict of interest causes them to undermine the representativeness and accountability that the Constitution was designed to ensure.

B. Claims of Severe Partisan Gerrymandering Are Justiciable.

Even though this Court has consistently agreed that a "severe partisan gerrymander" is incompatible with core American democratic principles, Appellants urge that the Court do nothing to protect those principles, because, they contend, it is too difficult to craft a sufficiently precise standard by which all future partisan gerrymanders may be judged. *See* Appellants' Br. at 41.

Amici do not share Appellants' pessimism. *Amici* reject the idea that the Court should declare all partisan gerrymanders to be nonjusticiable political questions simply because of the difficulty of articulating a standard that would easily resolve all future cases. Judicially manageable standards do exist, and, in fact, were articulated by the District Court, which drew from and built upon this Court's precedents.

In its plurality opinion in *Bandemer*, this Court articulated the following standard by which partisan gerrymanders should be adjudicated: the "plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127. *Vieth* questioned the workability of the *Bandemer* standard, but did not disturb the central *Bandemer* holding that the law must protect American citizens' right to fair and effective representation from being sabotaged by partisan machinations of the party currently in power. The District Court in this case did what our system expects district courts to do: it followed explicit precedent where it could, and where existing precedent provided broad principles rather than explicit guidance, it applied its best judgment in accordance with those principles. The District Court articulated the standard for adjudicating a partisan gerrymander as follows:

> [T]he First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of

> individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.

J.S. App. 109a-110a. The District Court then proceeded, in exhaustive detail, to analyze why the elements of the test had been met.

This process—the District Court's expanding upon and developing the teachings and standards of this Court with additional detail and judgment—is entirely consistent with the way legal tests and standards develop through constitutional adjudication. As Professor Hart explained in his analysis of Justice Holmes, "the mechanisms for orderly change" constitute the "very heart of the process by which justice can be achieved through law." Henry M. Hart, Jr., *Holmes' Positivism – An Addendum*, 64 Harv. L. Rev. 929, 937 (1951). For example, in a series of cases directly relevant to this case, this Court proceeded step by step, first holding only that questions about the redistricting of state legislative districts were justiciable, and not political questions, *see Baker v. Carr*, 369 U.S. 186, 232 (1962). Standards for adjudicating such cases began to emerge in *Reynolds v. Sims*, 377 U.S. 533 (1964), and have continued to be refined by cases such as *Fortson v. Dorsey*, 379 U.S. 433 (1965), *Gaffney v. Cummings*, 412 U.S. 735 (1973), and others.

The Court has never held that legal standards must be so exact as to permit mechanical application by the lower courts. The Court has long relied on the ability of the lower courts to exercise good judgment and discretion to apply the guidelines and standards

set forth by this Court. For example, in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court set forth a test to determine whether an individual has a "property interest in a [government] benefit" protected by the Due Process clause. The Court did not provide the lower courts with a standard that would permit mechanistic application, but with well-defined guiding principles: "a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of [the benefit]. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. This standard, like other judicial guidelines, has proven workable, durable, and predictable in the hands of able jurists. *See, e.g.*, *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S 748 (2005) (Scalia, J.) (highlighting various situations in which specific implementation of guidelines set forth by this Court is entrusted to the discretion of the lower courts and other government officials).

Appellants nevertheless insist that the supposed failure, in the years since *Bandemer*, to articulate a judicial standard for evaluating the lawfulness of partisan gerrymanders that meets a standard of precision this Court has not required in other areas of the law, should force the Court to conclude that no meaningful standard can possibly exist. This is no reason for the Court to abdicate its primary responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). As Justice Kennedy emphasized in his concurrence in *Vieth*, "by the timeline of the law 18 years is rather a short period" and the fact that the lower courts did

not discover a better standard during that time only reflects the fact that "the lower courts could do no more than follow *Davis v. Bandemer*." *Vieth*, 541 U.S. at 312.

Indeed, even as this case is pending, Judge Niemeyer, in his dissent in the *Benisek v. Lamone* case, observed:

> [A] categorical rule that would abandon efforts at judicial review surely cannot be accepted lest it lead to unacceptable results. . . . [A] controlling party[] could theoretically create . . . districts by assigning to each district [a certain percentage of individual citizens by political affiliation], regardless of their geographical location. . . . Such a pointillistic map would, of course, be an absurd warping of the concept of representation, resulting in the very 'tyranny of the majority' feared by the Founders. Yet, such an extreme possibility would be open to the most politically ambitious were courts categorically to abandon all judicial review of political gerrymandering.

Benisek, 2017 WL 3642928, at *16 (Niemeyer, J., dissenting).

The District Court in this case articulated a standard for adjudicating a partisan gerrymander entirely consistent with this Court's precedent, expanded upon that precedent in a manner wholly consistent with typical jurisprudential practices, and, as more fully set forth below, applied that standard carefully and thoroughly to the facts of the case. If

this Court finds that the District Court applied an erroneous standard, the remedy ought to be to correct the standard and remand the case to the District Court for further proceedings consistent with the corrected standard. The Court need not take an all-or-nothing approach in which it must choose between demanding an unrealistic level of "precision" or concluding that no meaningful standard can possibly exist. A more measured approach is readily available, and would significantly advance the law by establishing where at least some of the limits to partisan gerrymandering lie. "Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

III. This Court Should Declare Act 43 Unconstitutional To Ensure That The American Promise Of Representative Democracy Is Fulfilled.

The record before the Court in this case makes clear that Act 43 presents exactly the type of redistricting scheme that violates fundamental American democratic norms, the First Amendment, and the Equal Protection clause.

The drafters of Act 43 used modern technologies and techniques, which this Court has never before considered, specifically to "place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation." J.S. App. 109a-110a. Appellants cannot justify Act 43 "on other, legitimate legislative grounds." J.S. App. 110a. Republican lawmakers carefully crafted Act 43 for the purpose of creating a durable partisan advantage

in converting the votes of even a minority of citizens into a majority of legislative seats. Their effort was resoundingly successful, resulting in a Wisconsin legislature that was neither representative of the votes of the citizens, nor accountable to them.

- ***Intent of Act 43:*** Even the dissent in the District Court agreed that the evidence of partisan intent was clear: "It is almost beyond question that the Republican staff members who drew the Act 43 maps intended to benefit Republican candidates." J.S. App. 237a (Griesbach, J., dissenting). Appellants do not contest this conclusion.
- ***Effect of Act 43***: This Court, in *Bandemer*, held that the plaintiff could not rely on a single election to prove illegality. *See* 478 U.S. at 135. In Wisconsin, however, actual election results have repeatedly shown that Act 43 achieved the desired effect of enabling Republican lawmakers to maintain a substantial majority of Assembly seats, regardless of ballot returns. In 2012, Republicans in Wisconsin received 48.6% of the two-party statewide vote share for Assembly candidates, yet won 61% of the Assembly seats. In 2014, Republicans received 52% of the two-party statewide vote share, yet won 64% of the Assembly seats. J.S. App. 30a-31a. These results were neither the inevitable result of political geography nor a fluke of a single isolated election. They were the result of incumbent lawmakers spending significant time, effort, and money hiring data scientists,

cartographers, and election experts, and vetting multiple maps until they found the ones that would ensure these results. J.S. App. 124a-140a.

- ***Durability of Act 43***: Act 43's effects will extend well beyond the 2012 and 2014 elections. The District Court relied on evidence stating that "[b]arring an 'unprecedented political earthquake,' Democrats would be at an electoral disadvantage for the duration of Act 43." J.S. App. 164a. Tad Ottman, a staff member for the Wisconsin Senate Majority Leader, in his presentation to the Wisconsin Republican caucus, noted that "[t]he maps we pass will determine who's here 10 years from now," and "[w]e have an opportunity and an obligation to draw these maps that Republicans haven't had in decades." J.S. App. 28a. Professor Gaddie, whom the incumbent lawmakers retained as an independent "advisor on the appropriate racial and/or political make-up of legislative . . . districts" (J.S. App. 127a (emphasis omitted)), testified that "consistent with what actually occurred in 2012 and 2014, under any *likely* electoral scenario, the Republicans would maintain a legislative majority." J.S. App. 148a.[5] Mr. Ottman (and

[5] Specifically, analysis of the "Team Map" developed with Professor Gaddie's assistance proved that "to maintain a comfortable majority (54 of 99 seats),

> the Republican leadership) understood that the objective of these maps was to remove uncertainty from future elections, because the maps, not the voters, would determine the results.

This case therefore presents a clear example of how entrenchment is achieved through political gerrymandering: incumbent lawmakers used modern technology purposefully to "subordinate adherents of one political party" for at least ten years without regard to the will of the voters. *Ariz. State Legislature*, 135 S. Ct. at 2658. In the words of President Washington, Act 43 has "put in the place of the delegated will of the nation the will of a party." Washington's Farewell Address, *supra*, S. DOC. NO. 106-21, at 14.

By design, partisan entrenchment resists change through the political system. The entire point of Act 43 was to ensure that one party retains statewide control of Wisconsin for *at least* 10 years. Beyond the ten-year period, it is reasonable to assume that the party that benefitted from partisan gerrymandering would, in the absence of limits set by this Court, continue to use the same techniques to draw new district maps that would further entrench the party in power. Unless this Court sets limits, partisan gerrymandering in Wisconsin and around the

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Republicans only had to maintain their statewide vote share at 48%. The Democrats, by contrast, would need more than 54% of the statewide vote to obtain that many seats." J.S. App. 149a.

country will worsen as new technologies, and more expansive and refined voter data, are deployed in the next redistricting cycle. Modern data analysis, statistical techniques, and computer-designed district maps present deeper and more insidious threats of undemocratic outcomes than our Founders could have anticipated. Such technologies and techniques give a ruling class the tools it needs to elect representatives of its choice, rather than the choice of the citizenry.

Even if a "wave election" were to disrupt the incumbent ruling class in Wisconsin, absent legal limits, there would be no reason to expect the new party in power to fix the problem of partisan gerrymandering, rather than try to exploit the same techniques for its own partisan ends. As President Washington warned, the "spirit of revenge" would lead, at best, to alternating political parties engaged in ever more aggressive partisan gerrymandering, ever increasing removal of the voice of the citizens from government, and, at worst, to a "frightful despotism." *Id.* at 16-17.

If this Court fails to set limits on severe partisan gerrymanders like Act 43, the American people will be left with a political system that has degenerated into a new form of the old government from which our Founders declared independence: government controlled by an entrenched ruling class, rather than by the people. Because the very nature of the problem is a political system that has been rigged to resist the will of the people as expressed in elections, and because partisan gerrymandering offends basic constitutional rights and principles, this Court is

uniquely positioned as the only American institution that carries both the ability and the responsibility to protect our foundational American democratic ideals.

* * *

This case calls upon this Court to safeguard the same fundamental right to democratic representation for which the Sons of Liberty tossed tea into Boston Harbor, declared their independence, waged war against the greatest military power the world had ever seen, and crafted a Constitution that would become a model of democratic governance around the world. This fundamental ideal of governmental power derived from the consent of the governed is threatened by partisan gerrymandering, which transfers power from the people to an entrenched ruling class. This case presents the Court with incumbent legislators who openly subvert democracy through the abuse of modern statistical techniques and map-drawing software that ensure that the government represents the interests of those who draw district lines rather than those who vote within districts. At Gettysburg, President Lincoln encapsulated the vision of our Founders as a "government of the people, by the people, for the people." It now falls to this Court to ensure that a "nation so conceived and so dedicated, can long endure."

For the reasons set forth above, *amici* respectfully submit that Act 43 is a clear example of an unconstitutionally severe partisan gerrymander, and urge this Court to preserve and defend the most basic of American ideals by affirming the decision below.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

DAVID LEIT
Counsel of Record
NATALIE J. KRANER
ERIC WEINER
BRANDON FIERRO
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, NJ 07068
(973) 597-2500
dleit@lowenstein.com

Counsel for *Amici Curiae*

APPENDIX

APPENDIX: List of *Amici Curiae*

The **American Jewish Committee** ("AJC") was founded in 1906 to protect the rights of American Jews and all Americans. It has long since concluded that those rights are best protected in a functioning representative democracy where elected officials are subject to contested elections. Gerrymandering of the sort involved in this case is inconsistent with that sort of democracy.

The **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all backgrounds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. Its founding charter, which proclaimed that ADL's mission would be "to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens," guides ADL's work to this day. ADL believes that the Constitution requires that each person in our nation receive equal treatment under the law, and that severe partisan gerrymanders undermine the right of every voter to have a meaningful say in the democratic political process.

The **County of Santa Clara** ("County") is a charter county organized and existing under the laws of the State of California. Its mission is to protect the health, safety, and welfare of 1.9 million County residents. As an entity subject to federal law, as well as a governmental entity with a responsibility to protect the welfare of its residents, the County has a strong interest in promoting and protecting core

democratic principles at the local and national levels. The County also administers local, state, and federal elections.

Democracy 21 is a non-profit, non-partisan policy organization that works to eliminate the undue influence of big money in American politics, to ensure the integrity and fairness of our elections and government decisions, and to promote citizen participation in the political process. It supports campaign finance, voting, redistricting and other political reforms to ensure that American democracy is representative and accountable, conducts public education efforts for these ends, participates in litigation involving the constitutionality and interpretation of campaign finance and other democracy reform laws, and works for the proper and effective implementation and enforcement of those laws. Democracy 21 has participated as counsel or *amicus curiae* in many cases before this Court involving the constitutionality of campaign finance and other government reform laws.

Demos is a national public policy organization working for an America where everyone has an equal say in our democracy and an equal chance in our economy. Demos works to advance voting rights and curb the undue influence of big money in politics, in addition to promoting economic opportunity and racial equity. Severe partisan gerrymandering undermines Americans' right to full and equal participation in our democracy, and therefore directly threatens Demos' goals. Demos has regularly submitted briefs as *amicus curiae* to this Court and will appear as counsel before the Court in the upcoming term.

Friends of the Earth ("FoE") is a non-profit organization, founded in 1969, with offices in Washington, D.C. and Berkeley, California. FoE has close to 300,000 members in all 50 states. FoE's mission is to defend the environment and champion a healthy and just world. FoE works to create, maintain, and enforce stronger and more effective environmental laws and policies. As part of that mission, FoE's democracy campaign fosters more responsive democratic political institutions by opposing (a) gerrymandering and voter suppression methods that suppress the voice of American voters, and (b) the use of unrestricted money in politics to unfairly influence the public agenda, especially environmental concerns.

The **Government Accountability Project** ("GAP") is a non-profit, non-partisan public interest organization that promotes government and corporate accountability by litigating whistleblower cases, publicizing whistleblowers' concerns, and developing legal reforms to support the rights of employees to use speech rights to challenge abuses of power that betray the public trust. Representative democracy, like whistleblowing, is a mechanism to promote institutional accountability. Severe partisan gerrymandering undermines a functional and fair government accountable to the people. GAP, as an organization committed to protecting civil society from the effects of an unaccountable government—corruption, illegality, abuses of authority, and dangers to public health, safety and the environment—joins this brief.

The **National Council of Jewish Women** ("NCJW") is a grassroots organization of 90,000

volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Election laws, policies, and practices that ensure easy and equitable access and eliminate obstacles to the electoral process so that every vote counts and can be verified." Consistent with its Principles and Resolutions, NCJW joins this brief.

The **Natural Resources Defense Council** ("NRDC") is a national, non-profit environmental and public health organization with several hundred thousand members nationwide. NRDC's mission is to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. For more than three decades, NRDC's scientists, policy advocates, and lawyers have worked to secure the rights of all people to clean air, clean water, and healthy communities. NRDC works with elected representatives at all levels of government, from mayors' offices to state legislatures to Congress, to advance laws and policies that place the public interest first. NRDC joins this brief because severe partisan gerrymandering threatens the core tenets of representative democracy and erodes the ability of citizens to advocate effectively for causes in which they believe.

OneVirginia2021: Virginians for Fair Redistricting ("OneVirginia2021") is a nonprofit corporation organized to initiate a comprehensive effort to remove partisan gerrymandering from the redistricting process in Virginia. OneVirginia2021

pursues reform through public education, participation in litigation, and other means. Severe partisan gerrymandering undermines our democratic institutions, weakens the rule of law, violates the rights of citizens to equal protection, and allows the government to disadvantage voters whose political views differ from those of incumbent legislators. OneVirginia2021 is committed to electoral districts that fairly represent the viewpoints of all voters, no matter where they fall on the political spectrum.

Public Citizen, Inc. is a non-profit advocacy organization that, on behalf of its members in every state, appears before Congress, administrative agencies, state governments, and courts on a wide range of issues. Public Citizen seeks to advance legislation on both federal and state levels to protect consumers and workers and to foster open and fair governmental processes. The integrity of our nation's electoral system has long been one of Public Citizen's central concerns, both as an end in itself and because of its direct impact on Public Citizen's other policy concerns. As a result, Public Citizen's advocacy efforts often focus on legislation affecting the conduct of elections, and Public Citizen has frequently submitted briefs as *amicus curiae* to this Court in cases presenting election-law issues. *See, e.g.*, *Republican Party of La. v. FEC*, 137 S. Ct. 2178 (2017); *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).